No. 12522

United States
Court of Appeals
for the Ninth Circuit.

GRACE HARTLEY EMERY, ROBERT W. EMERY, DANIEL DOUGHERTY and P. S. DOUGHERTY, Also Known as MRS. DANIEL DOUGHERTY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

DANIEL DOUGHERTY,

820 S. Serrano Ave.,
Los Angeles 5, Calif.

For Appellee:

ABE I. LEVY,

FRANK L. HIRST,

STEPHEN D. MONAHAN,

ASHER SCHEIR,

BENJAMIN CHAPMAN,

RICHARD G. SOLOF,

CHRISTIAN V. MURRAY,

EVELYN ST. JOHN,

1206 Santee St.,
Los Angeles 15, Calif.

In the United States District Court, Southern District of California, Central Division

No. 9819-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MRS. GRACE HARTLEY EMERY, ROBERT W. EMERY, DANIEL DOUGHERTY, P. S. DOUGHERTY, Also Known as MRS. DANIEL DOUGHERTY, DOES I TO X,

Defendants.

COMPLAINT FOR TREBLE DAMAGES, RESTITUTION AND INJUNCTION

I.

Plaintiff brings this action for restitution pursuant to Section 205(a) of the Emergency Price Control Act of 1942, as amended, and brings this action also for injunction, restitution and treble damages pursuant to Sections 205 and 206 of the Housing and Rent Act of 1947, as amended, (Public Law 31, 81st Congress, 1st Session).

II.

Jurisdiction of this action is founded upon Section 205(c) of the Emergency Price Control Act of 1942, as amended, and Section 206 of said Housing and Rent Act of 1947, as amended. [2*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

III.

At all times mentioned herein prior to July 1, 1947, the housing accommodations located at 820-830 South Serrano Avenue, Los Angeles 5, California, have been subject to maximum rents authorized and established pursuant to the Emergency Price Control Act of 1942, as amended. At all times mentioned herein on and after July 1, 1947, said housing accommodations have been subject to maximum rents authorized and in effect pursuant to said Housing and Rent Act of 1947, as amended. At all times mentioned in this complaint said premises have been within the Los Angeles Defense Rental Area.

IV.

That the defendants Doe I to Doe X are the fictitious names of the defendants whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

Defendant received from persons for the use and occupancy of said accommodations rents in excess of the maximum rents established pursuant to said Acts. A schedule is attached hereto and by reference made a part hereof, as though fully set out herein. Said Schedule states the names of the per-

sons using and occupying said accommodations, and the period of occupancy by such persons. Said Schedule states the rents charged to and received from said persons for such use and occupancy during said period. Said Schedule states the applicable maximum rent. Said Schedule states the amount of the overcharges.

VI.

In the judgment of the Housing expediter the defendant has engaged and is about to engage in acts and practices which constitute and will constitute violations of provisions of said Acts and of regulations, orders [3] and requirements issued thereunder.

Wherefore, the plaintiff demands:

A. Judgment for the plaintiff to recover of the defendant treble the total amounts charged to persons, or demanded, accepted or received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in this complaint, within one year prior to the filing of this complaint, which were in excess of the maximum rents established pursuant to said Housing and Rent Act of 1947, as amended and further that:

B. The defendant be ordered and directed to pay to the Treasurer of the United States for and on behalf of all persons entitled thereto a refund of all amounts in excess of the maximum rents established pursuant to said Acts which were received by the defendant, his agents or employees since the date maximum rents were established for said housing accommodations pursuant to said Acts; provided that refunds made by the defendant for and on

behalf of such persons in compliance with the direction of the Court for rents received within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding Paragraph "A"; or, in the alternative, that the defendant be ordered and directed to pay the amount of the overcharge referred to in this Paragraph "B" to the United States of America, and

C. A preliminary and final injunction enjoining the defendant, his agents, servants, employees, and all persons in active concert or participation with him, from:

1. Directly or indirectly charging, demanding, accepting or receiving amounts in excess of the maximum rent established pursuant to the aforesaid Acts, and said Acts as hereafter amended or superseded and the regulations issued thereunder.

2. Directly or indirectly discontinuing, withholding, suspending or shutting off the supply of services, including utilities, heat, hot and cold [4] water, janitorial and maid service, furniture, furnishings, equipment, living space and all other services which the landlord is required to provide by said Acts and the regulations issued pursuant thereto, or threatening to do any of the foregoing with reference to the above-described housing accommodations or any other controlled housing accommodations owned, managed or controlled by defendant.

3. Engaging in any action or course of action

the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled or managed by the defendant, and from evicting said tenants in any form or manner contrary to said Housing and Rent Act of 1947, as amended, and regulations issued pursuant thereto as heretofore or hereafter amended or superseded.

4. Violating said Housing and Rent Act of 1947, as amended, and any of the regulations issued pursuant thereto, as heretofore or hereafter amended or superseded.

/s/ CHRISTIAN V. MURRAY,
Attorney, Office of the Housing Expediter.

Housing Accommodations located at 820-830 South Serrano Avenue, Los Angeles 5, California.

Unit	Name of Tenant	Period of Overcharge	Amount Paid	Legal Maximum Rent	Amount of Overcharge
820¼	Norman L. Rogers	1-7-45 to 5-1-48	$80.00 month	$70.00 month	$397.50
		5-1-48 to 9-1-48	92.00 month	70.00 month	110.00
820¼	Viva C. Shea and Patricia O'Brien	10-15-48 to 6-30-49	100.00 month	70.00 month	255.00
830	Maxine W. Woody	10-27-48 to 12-1-48	106.65 for period	70.00 month	30.00
		12-1-48 to 6-1-49	100.00 month	70.00 month	210.00
				Total amount of overcharges	$1002.50

Statement referred to in paragraph V on page 2 of plaintiff's complaint.

[Endorsed]: Filed June 9, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT

To Christian V. Murray, plaintiff's attorney, 1206 Santee St., Los Angeles 15, California:

Please Take Notice that the attached motion to dismiss the complaint will be brought on for hearing before this Court in Court Room No. 5, United States District Court, United States Post Office and Court House Building, Los Angeles, California, on Monday, August 8, 1949, at 10 a.m., or as soon thereafter as counsel can be heard.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

All defendants, except the Does, move the Court under Rule 12b, Federal Rules of Civil Procedure, to dismiss the complaint for:

1. Lack of jurisdiction over the subject matter;

2. Failure to join an indispensable party;

3. Failure to state a claim upon which relief can be granted.

4. Unconstitutionality of the Housing and Rent Act of 1949.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

POINTS AND AUTHORITIES ON MOTION TO DISMISS

The Complaint

The United States acting as sovereign or proprietor or agent sues the defendants on contracts between landlords and tenants for the use of furnished apartments alleging that the consideration for such contracts is in part unlawful; that the tenants are entitled to a refund of overcharges; and that the United States is entitled to a penalty based on the amount of the overcharges.

I. Jurisdiction.

The complaint covers a period from January 7, 1945, to June 30, 1949, alleging overcharges to three tenants in two apartments of a total of $1,002.50.

All of the overcharges in the years 1945, 1946, 1947 and part of 1948 are barred by the statute of limitations of one year in the Housing and Rent Act of 1949, Sec. 204, thereby reducing the amount here involved to approximately $500.00. In stating this amount I wish to reserve the point that the United States had no right of action prior to April 1, 1949, and that the right of action was not retroactive. The United States, at most, has a right to recover a penalty on $90.00 of overcharges.

The jurisdiction of this Court must be found in the Housing and Rent Act of 1949, and sections 1345, 1331 and 1332, Judicial Code or United States Code.

Section 205 of the Housing and Rent Act of 1949, amending Section 206 of the Housing and Rent Act of 1947, in referring to injunctive relief by the United States, provides:

"The United States may make application to any [9] Federal, State or Territorial court of competent jurisdiction for an order, etc."

With this language of the law as expressed by Congress this Court, as a court of limited jurisdiction, must find its jurisdiction in the United States Code, sections 1331 or 1332. Applying either section the complaint fails for lack of the jurisdictional amount of $3000.00. See Fox v. 34 Hillside Realty Company, 79 F. Supp. 832.

II. Indispensable party.

The tenant beneficiary of governmental patrimony is an indispensable party. Prior to April 1, 1949, the effective date of the Housing and Rent Act of 1949, the tenant alone had the right to sue for an overcharge under the Housing and Rent Act of 1947. The period covered by the complaint herein goes back to 1945, and the complaint is asserted under sections 205(c) of the Emergency Price Control Act of 1942, as amended, and section 206 of the Housing and Rent Act of 1947, as amended. See paragraph II, page 1, complaint. Incidentally, section 901 of the Emergency Price Control Act of 1942 declared its purpose to be "to prevent speculative, unwarranted, and abnormal increases in prices and rents." See Title 50, USCA

War Appendix, section 901. There is no allegation in this complaint that the rents charged were speculative, unwarranted or abnormal. Section 203 of the Housing and Rent Act of 1947, 61 Stat. 197, terminated the establishment or maintenance of maximum rents under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations, so the function of the Emergency Price Control Act of 1942 in the present case is a peg from which the blanket of war power is stretched up to now to attempt to provide a constitutional basis for all housing and rent acts subsequent to 1947. [10]

III. Improper complaint.

In addition to the weaknesses in the complaint pointed out in points I and II, the complaint is bad for the reason that it asserts a claim for a period prior to the enactment of the law giving the alleged right of action and in conflict with the rights given to tenants in the prior laws. The complaint ignores every statute of limitation in prior laws. The United States at most had no right to maintain this action prior to April 1, 1949, and there is nothing in the Housing and Rent Act of 1949 which makes its right to sue retroactive.

IV. The Housing and Rent Act of 1949 is unconstitutional.

Cases concerning the constitutionality of the Housing and Rent Act of 1949 are pending in the

United States District Courts for the Southern District of New York and the Northern District of Illinois.

The case in New York was heard by Circuit Judge Learned Hand and District Judges Leibell and Ryan on June 30, 1949, in civil action No. 50-156, entitled Federal Landlords Committee, Inc., et al v. Tighe E. Woods, etc. It was heard on a motion to dismiss by the Housing Expediter whose main contention was that the Court had no jurisdiction of him because of venue and that he could not be sued in that district since he was a resident of the District of Columbia. The complaint filed under the Federal Declaratory Judgments Act seeks to have the Housing and Rent Act of 1949 declared to be unconstitutional. Should the court hold it has jurisdiction then it may pass on the questions of constitutionality.

The case in Chicago was before Hon. Elwyn R. Shaw in the United States District Court, who, according to newspaper accounts, held the "local option" clause of the 1949 Act to be unconstitutional, and promised a ruling on the whole act's constitutionality. [11]

In addition to the grounds of unconstitutionality urged in these cases, and as a ground applying to the present complaint, where in the Constitution is there any authority for Congress to pass a law giving the United States the right in a civil action to sue one citizen for and on behalf of another citizen. Had there been any clause in the original

draft of the Constitution giving such a power it is fair to observe that the Constitution would never have been adopted. In all criminal laws under which the United States prosecutes there is no right of action by the United States for any civil redress to a citizen which may be based on the acts involved in the crime. The United States must show clear and convincing authority to do so before it can exercise such an excessive power.

Respectfully submitted,

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1949.

MINUTE ORDER OF AUGUST 8, 1949

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 8th day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants, filed July 25, 1949, to dismiss; R. G. Solof, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants;

Court orders said motion to dismiss denied, and that defendants have twenty days to answer. [14]

In the United States District Court, Southern District of California, Central Division

No. 9819-Y

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MRS. GRACE HARTLEY EMERY, ROBERT W. EMERY, DANIEL DOUGHERTY, P. S. DOUGHERTY, Also Known as MRS. DANIEL DOUGHERTY, DOES I to X,
Defendants.

MEMORANDUM DECISION

Appearances:

For the Plaintiff:
ABE I. LEVY,
CHRISTIAN V. MURRAY,
Los Angeles, California.

For the Defendant:
DANIEL DOUGHERTY,
Los Angeles, California. [15]

Yankwich, District Judge:

The action is for treble damages, restitution and injunction. The defendants have filed a motion to dismiss. They attack the validity of the Housing and Rent Act of 1947 as amended, and the right to institute the action.

I do not agree with the recent decision in the case of Woods v. Shoreline Cooperative Apartments, Inc., decided July 13, 1949, by the District Court for the Eastern Division of Illinois, wherein the Housing and Rent Act of 1949 was held unconstitutional. The present Act follows the pattern of other Rent Acts. The war emergency still exists and the United States Supreme Court has held repeatedly that war powers may be exercised for a reasonable number of years after the actual "shooting war" ends, to take care of actual economic dislocations that follow each war. (Fleming v. Mohawk, etc. Lbr. Co., 1947, 331 U. S. 111.)

In Lewis v. Anderson, Secretary of Agriculture, 72 Fed. Supp. 119, involving sugar controls, I held that administrative penalties could be imposed on retailers for violating sugar controls after the "shooting war" had ended. I used this language, which is as applicable today as on June 9, 1947:

"Wars have never actually terminated on the day "cease fire" orders were given. Many of them continued for decades, not so much in the form of actual fighting, but in the disruption and dislocation which they caused in the life of the nations involved. These facts, which are truisms to any student of history, apply especially to modern warfare as exemplified by the last war. [16] The destruction and the dislocation of the economic life of both the victor and the vanquished continued and will continue for years after the actual hostilities with Germany and Japan ended. And so those

who are in charge of regulating and controlling the economic life of the nations involved in the war have the difficult problem of determining when the various controls should come to an end. Wishful and unrealistic thinking call for immediate cessation of all governmental interference with economic life. Prudent statesmanship, economic or other, realizes the danger of immediate decontrol. The persons who are loudest in demanding the immediate return to free economy complain most vociferously about 'sudden decontrol.' Rightly. For economic life cannot stand 'sudden shock.' Adjustment from war to peacetime economy, if it is to be helpful, must be gradual.

"The failure to understand these fundamental economic principles is responsible for many of the contentions which are now made before the courts. Some litigants wish us to adopt the view that, regardless of what the Congress does, the actual cessation actually entitles businesses or activities under control to be relieved from it."

The United States Court of Appeals for the Ninth Circuit, on June 22, 1949, in the case of Woods v. McCord, 9 Cir., No. 12,039, decided on June 22, 1949, held that the various money recoveries, whether in the form of reimbursement or otherwise, are imposed for two purposes: (1) to make a landlord repay rent unlawfully exacted, and (2) to help enforce the law. This is a [17] complete answer to the contention made here that the Congress cannot authorize the Housing Expediter to collect sums under the jurisdictional mini-

mums of the United States District Court. Congress may choose the form in which it will enforce its own laws. As the Constitution does not limit the amount of the jurisdiction of the District Courts, the Congress may make jurisdiction independent of the amount involved. (Rent Act, secs. 205, 206. See Creedon v. Randolph, 5 Cir., 1948, 165 F(2) 918.)

On the question of delegation of legislative power, the case of Carter v. Carter Coal Company, 1936, 298 U. S. 238, has lost its force. When the Congress authorized cities to recommend decontrol after hearings, the delegation of power in that respect was no greater than that given to the advisory committees under the Agricultural Act, which many years ago I upheld in the case of Redlands Foothill Groves v. Jacobs, 1937, 30 Fed. Supp. 995. (This case was upheld by the upper courts.)

So the matters presented in this case are not new as far as this Court is concerned. I have ruled on similar matters in the past. If to this fact I add the obligation of lower courts to apply the resumption of constitutionality to acts of the Congress, it is evident that none of the points raised is meritorious, and I need not wait until the Supreme Court has acted on the matter.

The motion to dismiss is denied.

Dated this 12th day of August, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Aug. 12, 1949. [18]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE A SECOND MOTION TO DISMISS.

To Christian V. Murray, plaintiff's attorney, 1206 Santee St., Los Angeles 15, California:

Please Take Notice that the attached motion for leave to file a second motion to dismiss the complaint will be brought on for hearing before this Court in Court Room No. 5, United States District Court, United States Post Office and Court House Building, Los Angeles, California, on Monday, September 12, 1949, at 10 a.m., or as soon thereafter as counsel can be heard.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants. [19]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE A SECOND MOTION TO DISMISS THE COMPLAINT

In the absence of the District Judge, and in view of the memorandum opinion by said District Judge filed herein on August 12, 1949, this motion is made on notice in writing instead of orally ex parte.

Said second motion to dismiss, if allowed to be filed, will be based on the following grounds:

(a) That Section 204 of the Housing and Rent Act of 1949, which purports to give the United States the right to sue a landlord for and on behalf of a tenant is unconstitutional.

(b) That if said section 204 is constitutional then the tenant is an indispensable party along with the United States to any suit.

(c) That the attorneys who have appeared herein representing the United States do not allege their authority to appear for the United States and have no authority to do so.

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

POINTS AND AUTHORITIES ON MOTION FOR LEAVE TO FILE A SECOND MOTION TO DISMISS

Need for Motion

Paul O'Brien's Manual of Federal Appellate Procedure, 3d Ed., p. 7 states:

"The law requires that errors, to be reviewable, must have been definitely and timely called to the attention of the trial court, in order to afford that court a fair opportunity to pass upon the matter, and correct its own errors, if any. The purpose is to require counsel, at the proper time, to call the attention of the court to the claimed error with sufficient certainty and definiteness for the court to understand clearly the precise action of the court attacked or the precise action of the court which is sought to be obtained. Whether this has been done in a particular instance depends upon the actual situation in the trial at the time. If the reviewing court can see that the matter was so

raised in the trial as to present clearly to the mind of the trial court the same point that is urged on review, the ruling below is subject to review."

This court in its memorandum opinion does not mention the constitutionality of Section 204 of the Housing and Rent Act of 1949. Section 204 was new legislation and in a new field, namely, purporting to create a right for the United States to file a civil suit for and on behalf of one citizen against another citizen. Tenants are not wards of the Government like Indians, or seamen.

Defendants, as the target for the venting of the spleen of a departed, cantankerous tenant, who failed in his efforts to organize other tenants, wish to present two questions, which in interrogative form are: [21]

Is section 204 of the Housing and Rent Act of 1949 constitutional?

If it is constitutional is the tenant an indispensable party to any suit thereunder filed on the tenant's behalf?

The points raised in these questions were covered in points IV and II of the points and authorities filed in support of the original motion to dismiss. These questions are not answered in the memorandum opinion of the court as definitely and specifically as the admonition of Paul O'Brien's Manual requires. Therefore, these two questions are respectfully repeated here.

A New Ground to Dismiss

The attorneys for the United States do not show or allege their authority to appear for the United States. Seven individual attorneys are listed at the top of page one of the complaint as attorneys for the plaintiff, one of whom signed the complaint as attorney. There is no allegation of authority in the complaint.

Section 507, Part II, Title 28, United States Code, provides:

"Sec. 507. Duties; supervision by Attorney General.

"(a) It shall be the duty of each United States Attorney, within his district, to: (1) * * *; (2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned";

(b) Provides for the supervision of litigation and its direction by the Attorney General.

Respectfully submitted,

/s/ DANIEL DOUGHERTY,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1949. [22]

MINUTE ORDER OF SEPT. 12, 1949

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 12th day of September, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants filed Aug. 29, 1949, for leave to file second motion to dismiss; A. Scheir, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants; Court orders said motion denied and allows defendants 10 days to answer. [24]

[Title of District Court and Cause.]

ANSWER OF GRACE HARTLEY EMERY, ROBERT W. EMERY, DANIEL DOUGHERTY AND P. S. DOUGHERTY

First Defense

That the attorneys appearing for plaintiff in the complaint herein are not authorized to appear for the United States.

Second Defense

That Section 204 of the Housing and Rent Act of 1949 is unconstitutional.

Third Defense

That Section 204 of the Housing and Rent Act of 1949 became effective April 1, 1949, and has no retroactive effect.

Fourth Defense

That the tenant beneficiaries of this action, namely, Norman L. Rogers, Patricia O'Brien, Viva C. Shea, and Maxine W. Woody are indispensable parties to the action.

Fifth Defense

That the complaint herein fails to state a claim against defendants upon which relief can be granted. [25]

Sixth Defense

That the complaint herein states a cause of action for the collection of a penalty.

Seventh Defense

That the United States has no right of action for restitution herein.

Eighth Defense

That the United States is not now engaged in war.

Wherefore, defendants pray that the complaint herein be dismissed.

/s/ DANIEL DOUGHERTY,

In Pro Per and as Attorney for Defendants, Grace Hartley Emery, Robert W. Emery and P. S. Dougherty.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 23, 1949. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

To: Daniel Dougherty, in propria persona and as attorney for defendants Grace Hartley Emery, Robert W. Emery, and P. S. Dougherty, also known as Mrs. Daniel Dougherty, 820 So. Serrano Avenue, Los Angeles 5, California:

Please Take Notice, that pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, plaintiff will move the Court in the Court Room of Honorable Leon R. Yankwich in the United States Post Office and Court House Building at 312 North Spring Street, Los Angeles, California, on December 19, 1949, at 10:00 a.m. or as soon thereafter as counsel can be heard:

1. For Judgment on the pleadings in plaintiff's favor for the relief demanded in the Complaint on the following grounds:

(a) Plaintiff filed a Complaint for Treble Damages, Restitution [28] and Injunction on June 9, 1949;

(b) Defendant Daniel Dougherty, appearing for himself and as counsel for defendants Grace Hartley Emery, Robert W. Emery, and P. S. Dougherty, also known as Mrs. Daniel Dougherty, filed a Motion to Dismiss the Complaint;

(c) Plaintiff on July 29, 1949, filed its Reasons and Points and Authorities in Opposition to defendants' Motion to Dismiss;

(d) Defendants' Motion to Dismiss was heard by this Court and denied on August 8, 1949. Defendants were granted twenty (20) days after August 8, 1949, to file their Answer;

(e) Defendants, on August 29, 1949, filed their Motion for Leave to File a Second Motion to Dismiss the Complaint;

(f) Plaintiff on September 7, 1949, filed its Reasons and Points and Authorities in Opposition to defendants' Motion for Leave to File a Second Motion to Dismiss;

(g) Defendants' Motion for Leave, etc., was heard by this Court and denied on September 12, 1949;

(h) Defendants' Answer to the Complaint was filed and served on the plaintiff by mail on September 22, 1949;

(i) The Complaint and the Answer of defendants show that there is no material issue of fact, and that the plaintiff is entitled to judgment against

the defendants, Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, P. S. Dougherty, also known as Mrs. Daniel Dougherty, as a matter of law.

This Motion is based on the pleadings and papers filed herein:

(a) Plaintiff's Complaint for Treble Damages, Restitution and Injunction;

(b) Defendants' Motion to Dismiss and the ruling of this Court thereon;

(c) The defendants' Answer; [29]

(d) Plaintiff's Points and Authorities filed herewith;

Dated: This 30th day of November, 1949.

ABE I. LEVY,

By /s/ EVELYN ST. JOHN,
Attorney for Plaintiff. [30]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

1. The Answer of defendants Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, and P. S. Dougherty, also known as Mrs. Daniel Dougherty, raises no material issue of fact; therefore, a

motion for judgment on the pleadings is proper.

Rule 12(c), Federal Rules of Civil Procedure.

Rosenhan v. U. S. 131 F (2) 932.

Geist v. Prudential Ins. Co., 35 F. Supp., 790.

Ulen Contracting Corp. v. Tri-County Electric Corp., (D.C. Mich.) 1 F.R.D. 284.

2. The affirmative defenses set forth in defendants' Answer are denied. Plaintiff will treat the said defenses seriatim;

a.

Defendants' first defense is without merit. Attorneys appointed by the Housing Expediter are authorized to appear for the United States in civil cases arising under the Housing and Rent Act of 1947, as amended.

Delegation of Authority, September 24, 1949, (published in Federal Register October 6, 1949).

b.

As to the defendants' second defense, the question of constitutionality was raised by these defendants and decided by this Court in its Memorandum Decision filed August 12, 1949.

c.

Defendants' third defense is without merit. The 1949 amendment to the Housing and Rent Act of 1947 has retroactive application.

Bowles v. Hastings, 146 F (2) 94.

Bowles v. Strickland, 151 F (2) 419.
Martini v. Porter, (CCA 9) 157 F (2) 35; (certiorari denied 330 U. S. 848).

d.

Defendants' fourth defense is without merit. The tenant is not an indispensable party to the action.

Creedon v. Randolph, 165 F (2) 918.
Woods v. McCord, 175 F (2) 919.

e.

Defendants' fifth defense, namely: that the Complaint failed to state a claim upon which relief can be granted, does not plead with particularity wherein the alleged defect consists. Consequently the plaintiff has not sufficient notice to enable it to meet the defendants' charge. For that reason plaintiff urges this Court to disregard defendants' fifth defense.

f.

The defendants' sixth defense, even if true, is not pertinent to this action. However, plaintiff does not concede that this is an action that is penal in nature; it is a civil action remedial in nature.

Kessler v. Fleming, (CCA 9) 163 F (2) 464.
U. S. v. Grannis, 172 F (2) 507; (certiorari denied May 31, 1949). [32]

g.

The defendants' seventh defense is without merit, as the plaintiff clearly has a right of action for restitution.

Creedon v. Randolph, (supra).
Woods v. Richman, 174 F (2) 614.
Woods v. McCord, (supra).

h.

The defendants' eighth defense is without merit. Cessation of hostilities and termination of a state of war are not synonymous terms.

Ex parte Milligan, 4 Wall 2; 18 L. Ed. 281.
U. S. v. Anderson, 9 Wall 56.
Stewart v. Kahn, 11 Wall 493.
Hamilton v. Kentucky Distilleries, 251 U. S. 146.
Fleming v. Mohawk Co., 331 U. S. 111.
Woods v. Cobleigh, 75 F. Supp. 594; (affirmed in 172 F (2) 167).

Respectfully submitted, this 30th day of November, 1949.

ABE I. LEVY,

By /s/ EVELYN ST. JOHN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 30, 1949.

[Title of District Court and Cause.]

OPPOSITION TO MOTION OF HOUSING EXPEDITER FOR SUMMARY JUDGMENT

To Hon. Leon R. Yankwich,
U. S. District Judge:

This case is on your Honor's calendar for January 9, 1950, for setting for trial.

I. All material facts are put in issue by defendants' appearance, prayer for dismissal, and answer.

Your Honor has often stated from the bench that the Court of Appeals for this Circuit does not favor summary judgments. See, also, Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co. (1945), 61 F. Supp. 62, holding that it is the policy of courts to dispose of law suits on their merits whenever possible rather than on motions for summary judgment or judgment on the pleadings.

Here defendants have appeared and answered. They have prayed for dismissal of the complaint.

Prayer C of plaintiff's complaint (which is about one-half prayer), seeks a preliminary and final injunction against [34] defendants which would be effective until July 1, 1950, or, perhaps, longer.

Since injunctions are prospective and deal with the future, and are based on the facts as they appear at the time of trial, every material fact is put in issue by the appearance of the defendants and their prayer for dismissal without more. The

Housing Expediter is asking this Court to enjoin defendants without a verified complaint, without an affidavit of any kind, without a deposition of any kind, and without a material fact being established by proof of any kind. Paragraph VI of the complaint contains allegations on which the injunction must be based which amount to no more than an opinion of the Housing Expediter.

Courts should be slow to grant summary judgment against defendant in a case where injunctive relief is sought. Lipson v. Interstate Home Equipment Co., D.C. Pa. 1944, 57 F. Supp. 955.

Your Honor has left too brilliant a trail of knowledge of the law of injunction in the pages of the Federal Supplement to require defendants to do more than cite your Honor's opinions, beginning with the consecutively printed opinions in 30 Federal Supplement of Northrop Corporation v. Madden and Redlands Foothill Groves v. Jacobs, et al., at pages 993 and 995, respectively, and dated August 18, 1937, and January 5, 1940. The trail also goes through Acret v. Hammond, 41 F. Supp. 492, on October 25, 1941; through Troy Laundry Co. v. Lockwood, 63 F. Supp. 384, on September 18, 1945; to Skelly v. Dockweiler, 75 F. Supp. 11, on December 5, 1947. There may be other opinions which I have missed because of the admonition of my physician to take things easy. However, Redlands Foothill Groves v. Jacobs is, no doubt, the most comprehensive.

II. Restitution.

Can any one tell from the complaint to whom and how [35] much restitution is to be made? Defendants did not take anything from the plaintiff, so how can they be required to restore anything to it? As to plaintiff it is an action for a penalty, and as to plaintiff's wards, the tenants, it may be restitution. Evidence is required to separate these amounts.

III. Treble damages.

Even if defendants had defaulted your Honor would require evidence on which to base a judgment.

IV. Defendants may be allowed to amend their answer.

This case is, I assume, subject to Rule 16, F. R. C. P. (pre-trial) under which the Court may allow necessary or desirable amendments to the pleadings. Two of the three tenancies concerned in this case have been terminated by acts of the tenants, one since defendants' answer was filed, and the third may be terminated before trial herein.

V. Attorneys for plaintiff have no right to appear.

Section 507 of Chapter 31, Part II, Title 28, United States Code, effective September 1, 1948, makes it the duty of each United States Attorney, within his district, to:

"(2) Prosecute or defend, for the government,

all civil actions, suits or proceedings in which the United States is concerned";

Nowhere in Chapter 31, supra, is authority given the Attorney General to supplant the United States Attorney. The Attorney General has authority to supervise, direct, and appoint assistants to the United States Attorney.

It is respectfully submitted that the Acting Attorney General, Hon. Peyton Ford, on September 24, 1949, had no authority to delegate to attorneys for the Housing Expediter even though he limited his attempted delegation so that such attorneys may not appear in the Supreme Court of the United States.

/s/ DANIEL DOUGHERTY,
Attorney for Named
Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 16, 1949. [36]

MINUTE ORDER OF DEC. 19, 1949

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of December in the

year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

For hearing motion of plaintiff, filed Nov. 30, 1949, for judgment on the pleadings; R. G. Solof, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants;

Attorney Solof waives plaintiff's request for injunction.

Court orders motion of plaintiff granted for $1,002.50 recovery, to be paid to tenants when received; and that no injunction issue. [38]

In the United States District Court, Southern District of California, Central Division

No. 9819-Y

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MRS. GRACE HARTLEY EMERY, ROBERT W. EMERY, DANIEL DOUGHERTY, P. S. DOUGHERTY, Also Known as MRS. DANIEL DOUGHERTY, DOES I to X,
Defendants.

JUDGMENT

Plaintiff having filed its complaint for treble damages, restitution and injunction and defendants

Mrs. Grace Hartley Emery, Robert W. Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, having filed a motion to dismiss said complaint, and the Court having denied said motion on August 8, 1949, and said defendants having filed a motion for leave to file a second motion to dismiss said complaint and the Court having denied said motion on September 12, 1949, and said defendants having filed their answer to said complaint, and plaintiff having filed its motion for judgment on the pleadings, and the matter having come on for hearing on said motion for judgment on the pleadings on December 19, 1949, before the Honorable Leon R. Yankwich, Judge, and the plaintiff at said hearing having waived its request for an injunction, and the plaintiff being represented by Richard G. Solof, Esq., and said defendants being represented by Daniel Dougherty, [39] Esq., one of the defendants herein, and the Court having heard arguments of counsel for plaintiff and said defendants, and the Court being fully advised in the premises, and it appearing to the Court that the defenses set forth in said defendants' answer do not constitute valid defenses to the allegations set forth in plaintiff's complaint, and it further appearing to the Court that plaintiff is entitled to judgment in its favor on the undisputed facts appearing in the pleadings, Now, Therefore, It Is Ordered, Adjudged and Decreed, that:

1. Judgment on the pleadings shall be and it is hereby entered herein in favor of the plaintiff and against the defendants Mrs. Grace Hartley Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, in the sum of One Thousand, Two Dollars and Fifty Cents ($1,002.50), and that same be paid at the Office of the Housing Expediter, Litigation Section, 1206 Santee Street, Los Angeles, California, in the form of a bank draft, cashier's check or certified check, or postal money order, made payable to the Treasurer of the United States.

2. Upon payment of the sum referred to in Paragraph 1 above, same shall be disbursed by plaintiff to the following tenants in the following amounts:

Norman L. Rogers	$507.50
Viva C. Shea and Patricia O'Brien	255.00
Maxine W. Woody	240.00

3. In the event plaintiff should be unable to locate any of the tenants named in Paragraph 2 above, the amount to which said tenant or tenants are entitled shall be retained by the Treasurer of the United States.

4. Costs shall be assessed against the defendants Mrs. Grace Hartley Emery, Robert W. Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, to be taxed by the Clerk in favor of the plaintiff in the sum of $43.72.

5. The second cause of action set forth in plaintiff's complaint shall be and it is hereby dismissed. [40]

6. The above-entitled action shall be and it is hereby dismissed as to defendants Does I to X.

Dated: Los Angeles, California, this 21st day of December, 1949.

/s/ LEON R. YANKWICH,
U. S. District Court Judge.

Approved As To Form,
this ..... day of December, 1949.

DANIEL DOUGHERTY,
Appearing in Propria Persona, and Attorney for Defendants, Mrs. Grace Hartley Emery, Robert W. Emery and P. S. Dougherty, Also Known as Mrs. Daniel Dougherty.

Presented this 20th day of December, 1949,
By /s/ RICHARD G. SOLOF,
One of the Attorneys
for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed and entered Dec. 21, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGMENT

To Christian V. Murray, Esq., Attorney for Plaintiff:

Please Take Notice that, pursuant to Rule 59 of the Federal Rules of Civil Procedure, defendants will move the Court in Court Room No. 7, United States District Court, Los Angeles, California, on Monday, January 16, 1950, at 10 a.m., or as soon thereafter as counsel can be heard, to alter or amend the judgment entered herein on December 21, 1949, recorded in Judgment Book 62, page 640, on the following grounds:

1. The form of the judgment is in violation of Rule 54 (a) Federal Rules of Civil Procedure.

2. The judgment does not show a compliance with the proviso of Section 204 of the Housing and Rent Act of 1949.

3. The judgment should be made payable at the office of the Clerk of this Court and not at the office of the Housing Expediter where no public record of payment or satisfaction of judgments is required by law.

4. The judgment does not provide the length of time or [43] amount of effort to be made by plaintiff in locating the four individuals to whom payment is to be made, or the form of evidence of such payment to be given by such individuals.

Dated, Los Angeles, California, December 31, 1949.

/s/ DANIEL DOUGHERTY,
Attorney for All Defendants
Except Does.

POINTS AND AUTHORITIES OF MOTION TO ALTER OR AMEND JUDGMENT

1. The form of the judgment is in violation of Rule 54 (a) Federal Rules of Civil Procedure.

This rule reads in part—

"A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

Lines 20, 21, 22, 23, 24, 25, 26, 27, and line 28 to and including the word "and" on page one should be stricken from the judgment.

2. The judgment does not show a compliance with the proviso of Section 204 of the Housing and Rent Act of 1949.

This section provides:

"That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period."

There was no allegation in the complaint, nor is there any recital in the judgment, respecting the

failure or disqualification of the tenants to institute an action.

3. The judgment should be made payable at the office of the Clerk of this Court and not at the office of the Housing Expediter where no public record of payment or satisfaction of judgment is required by law.

Where will there be a public record of payment or satisfaction of the judgment showing the removal of its lien? [45]

4. The judgment does not provide the length of time or amount of effort to be made by plaintiff in locating the four individuals to whom payment is to be made, or the form of evidence of such payment to be given by such individuals.

The judgment could have required the defendants to pay the tenants, the real parties in interest herein, and file evidence of such payment with the Clerk of this Court within a reasonable time.

In any event there can be no forfeiture of the moneys due the tenants, the real but not appearing parties in interest herein, without express authority of law.

Respectfully submitted,

/s/ DANIEL DOUGHERTY,
Attorney for Named
Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 31, 1940. [46]

MINUTE ORDER OF JAN. 16, 1950

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 16th day of January in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants filed Dec. 31, 1949, to alter or amend judgment; R. G. Solof, Esq., appearing as counsel for plaintiff; Daniel Dougherty, Esq., appearing as counsel for defendants; Attorney Dougherty argues in support of said motion.

Court orders said motion denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, P. S. Dougherty, also known as Mrs. Daniel Dougherty, hereby appeal to the Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on December 21, 1949.

/s/ DANIEL DOUGHERTY,
Attorney for Appellants, Grace Hartley Emery, Robert W. Emery, Daniel Dougherty, and P. S. Dougherty, Also Known as Mrs. Daniel Dougherty.

[Endorsed]: Filed Mar. 15, 1950. [49]

In the United States District Court, Southern District of California, Central Division

No. 9819 Y

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GRACE HARTLEY EMERY, et al.,
Defendants.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

I. Appellants designate the complete record.

II. Under Rule 75(g) F.R.C.P., appellants suggest the complete record, in chronological order, consists of:

1. Complaint.
2. Motion to dismiss complaint.
3. Order denying motion to dismiss.

4. Opinion of District Judge.
5. Motion for leave to file a second motion to dismiss.
6. Order denying motion for leave.
7. Answer.
8. Motion for summary judgment.
9. Opposition to motion for summary judgment.
10. Judgment.
11. Motion to alter or amend judgment.
12. Order denying motion to alter or amend.
13. Notice of Appeal. [50]
14. Designation of Contents of Record on Appeal.

DANIEL DOUGHERTY,
Attorney for Appellants.

State of California,
County of Los Angeles—ss:

Henry B. Donath being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 553 S. Western Ave., Los Angeles, Calif., that on the 20th day of March, 1950, affiant served the within designation of contents of record on appeal on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said plaintiff, Richard G. Solof, Esq., Litigation Attorney, 1206 Santee St., Los Angeles 15, Calif., and by then sealing said envelope and depositing the same, with postage

thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

HENRY B. DONATH.

Subscribed and sworn to before me this 20th day of March, 1950.

BEULAH E. DONATH,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires November 16, 1950. [52]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain the original Complaint for Treble Damages, Restitution and Injunction; Notice of and Motion to Dismiss Complaint; Memorandum Decision; Notice of and Motion for Leave to File a Second Motion to Dismiss; Answer of Grace Hartley Emery et al; Notice of and Motion for Judgment on the Pleadings; Op-

position to Motion of Housing Expediter for Summary Judgment; Judgment; Notice of and Motion to Alter or Amend Judgment; Notice of Appeal and Designation of Contents of Record on Appeal and full, and correct copies of Minute Orders Entered August 8, 1949; September 12, 1949; December 19, 1949, and January 16, 1950, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $3.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 12th day of April, A.D., 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12522. United States Court of Appeals for the Ninth Circuit. Grace Hartley Emery, Robert W. Emery, Daniel Dougherty and P. S. Dougherty, also known as Mrs. Daniel Dougherty, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12522

GRACE HARTLEY EMERY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' DESIGNATION OF RECORD AND STATEMENT OF POINTS

Designation of Record

Appellants designate the complete record for printing.

Statement of Points

1. That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional.

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff.

4. That the trial court erred in granting summary judgment against appellants.

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review.

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money.

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff.

/s/ DANIEL DOUGHERTY,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 24, 1950.